

Office of the Attorney General
State of North Dakota

Opinion No. 86-35

Date Issued: December 24, 1986

Requested by: Honorable John T. Schneider
State Representative

--QUESTION PRESENTED--

Whether a person convicted of a felony prior to the effective date of N.D.C.C. § 62.1-02-01 is thereafter subject to the prohibitions of that statute pertaining to the possession of firearms.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a person convicted of a felony prior to the effective date of N.D.C.C. § 62.1-02-01 is thereafter subject to the prohibitions of that statute pertaining to the possession of firearms.

--ANALYSIS--

N.D.C.C. § 62.1-02-01 provides, in part, as follows:

62.1-02-01. WHO NOT TO POSSESS FIREARMS--PENALTY.

1. A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of ten years from the date of conviction or release from incarceration or probation, whichever is the latter.

2. A person who has been convicted of any felony not provided for in subsection 1 or has been convicted of a class A misdemeanor involving violence or intimidation and that crime was committed while using or possessing a firearm or dangerous weapon, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control for a period of five years from the date of conviction or release from incarceration or probation, whichever is the latter.

The effective date of this provision was July 1, 1985. The issue is whether a person convicted of a felony prior to July 1, 1985, will be prohibited from possessing or controlling a firearm pursuant to the provisions of N.D.C.C. § 62.1-02-01(1) and (2).

A similar question was raised in *State v. Hall*, 301 N.W.2d 729 (Ia. 1981). An Iowa statute effective in 1978 prohibited the possession of firearms by a felon. The defendant claimed that the statutory provision did not apply to him since he had been convicted in 1972, six years prior to the effective date of the legislation. The court rejected the defendant's claim holding that the statutory prohibition applied to felons convicted before the enactment of the law as well as to those convicted after.

I do not find the application of the provisions of N.D.C.C. § 62.1-02-01 to persons convicted of a felony prior to July 1, 1985, to be an ex post facto law in violation of U.S. Const. Art. I, § 10 or N.D. Const. Art. I, § 18.

The North Dakota Supreme Court in *State v. Jensen*, 333 N.W.2d 686, 693-694 (N.D. 1983), defined an ex post facto law as:

'1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4. Every law that alters the legal rules of evidence and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.'

In *Jensen*, the court rejected the claim that the dangerous special offender statute, N.D.C.C. § 12.1-32-09, was an ex post facto law because the offenses which gave rise to its use occurred prior to the effective date of that law.

Although the North Dakota Supreme Court has not addressed this issue, numerous federal courts have been presented similar questions concerning federal firearms statutes which prohibit the receipt, transportation, or possession of firearms by convicted felons. In each of these instances, a defendant was charged with illegal possession of a firearm under the federal law based upon that person's conviction prior to the effective date of that law.

In *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), cert. denied, sub nom. *Valazquez v. United States*, 319 U.S. 770 (1943), the court found the provisions of 15 U.S.C. § 902 to not be an ex post facto law. This section prohibited the transportation or receiving of firearms by a felon. The court held that this statute was prospective only and did not impose an additional penalty for a criminal conviction before passage of that act. The court stated that a statute is a bona fide regulation of conduct which the legislature has the power to regulate even though the right to engage

in that conduct is made to depend upon behavior which may occur before passage of the act. If the past conduct can reasonably be said to indicate unfitness to engage in a future activity, the assumption will be that the purpose of the statute is not to impose an additional penalty and such statute will not be an ex post facto law. The court in Cases recognized that the federal firearms law was concerned with the regulation of the receipt and transportation of firearms and not as additional punishment for the past conviction.

Both *United States v. Lee*, 227 F. Supp. 450 (D.N.D. 1964), and *Klingler v. Erickson*, 328 F. Supp. 674 (D.S.D. 1971), upheld 15 U.S.C. § 902 after similar attacks by the respective defendants. In *Williams v. United States*, 426 F.2d 253 (9th Cir. 1970), cert. denied, 400 U.S. 881 (1970), the court also rejected a defendant's claim that 15 U.S.C. § 902 was an ex post facto law. Although this law was effective after the defendant's prior conviction and sentencing, the court rejected his claim that it inflicted punishment greater than the law applied to the crime when the crime was committed. The defendant's claim that an ex post facto law prevents retroactive imposition of civil disabilities was also rejected.

Substantial litigation has occurred concerning application of 18 U.S.C. App. § 1202 which was adopted as part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. This provision prevents the possession of firearms after June 19, 1968, by a person convicted of a felony. In *United States v. McCreary*, 455 F.2d 647 (6th Cir. 1972), the court found 18 U.S.C. App. § 1202 not to be an ex post facto law when applied to a person who had felony convictions in the years of 1957 and 1963. This provision has also withstood an ex post facto law attack in *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972), and in *United States v. Sutton*, 521 F.2d 1385 (7th Cir. 1975). In *Sutton*, the court specifically noted that this statutory provision does not criminalize an act done before its passage which, when committed, violated no law. Rather, the violation occurred for actions of the defendant after passage of the law.

18 U.S.C. App. § 1202 provisions pertaining to the preventing of a dishonorably discharged veteran from possessing a firearm have also withstood the ex post facto law attack. In *United States v. Day*, 476 F.2d 562 (6th Cir. 1973), the court upheld the conviction of the defendant for illegal possession of a firearm by a dishonorably discharged veteran. The defendant had been dishonorably discharged in 1945. The defendant was convicted of possessing a firearm in the year 1970, two years after enactment of 18 U.S.C. App. § 1202. Accord, *United States v. Karnes*, 437 F.2d 284 (9th Cir. 1971), cert. denied, 402 U.S. 1008 (1971).

These cases construing federal firearms acts and their application to the prohibition against ex post factor laws are clear

and definite in their holdings that statutory provisions preventing the possession of firearms by a felon regulate future conduct of such persons, do not impose additional punishment for the earlier offense, and do not impose punishment for an act not punishable at the time it was committed.

This same rationale is applicable to N.D.C.C. § 62.1-02-01. That section prohibits persons from possessing firearms after July 1, 1985, who have been previously convicted of a felony. The punishment imposed for a violation of that section is not in addition to the punishment originally imposed for the felony conviction but, rather, for the act of possessing or controlling a firearm after July 1, 1985.

N.D.C.C. § 62.1-02-01 is prospective only since it has not been expressly declared to be retroactive. N.D.C.C. § 1-02-10. As a result, a convicted felon's act of possessing or controlling a firearm occurring prior to July 1, 1985, will not be subject to N.D.C.C. § 62.1-02-01. However, that same act occurring after that date will subject the convicted felon to the criminal penalties imposed pursuant to that section. If the possession or control of the firearm by a convicted felon occurs after July 1, 1985, the effective date of N.D.C.C. § 62.1-02-01, application of that section to a person convicted of a felony prior to that date will not be an ex post facto law as defined in State v. Jensen. Not being an ex post facto law prohibited by U.S. Const. Art. I, § 10 and N.D. Const. Art. I, § 18, N.D.C.C. § 62.1-02-01 will prohibit the possession or control of firearms after July 1, 1985, for the time periods stated in that section, of all persons who have been convicted of felonies even though such convictions occurred prior to that date.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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